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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-557

BILLY JENKINS,

Appellant

v.

STATE OF GEORGIA,

Appellee

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR DIRECTORS GUILD OF AMERICA, INC., *Amicus Curiae*

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This brief is submitted in support of the Appellant's position. Both parties consented to the submission. Their letters of consent will be presented to the Court with the brief.

Statement Of The Case

The Appellant Billy Jenkins was fined $750 and was put on probation for a year for having exhibited the film "Carnal Knowledge" in Dougherty County, Georgia. He was convicted

of "distributing obscene materials", *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, at p. 184. Before the picture was shown in Dougherty County, it was exhibited in the larger cities of the United States and in many cities and towns in Georgia. There were no other proceedings to punish or prevent its exhibition. *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, at p. 186 (dissenting opinion).

Jenkins' conviction was sustained by the Supreme Court of Georgia with three of the seven Justices of that Court dissenting. *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d 183, 185. The majority and dissenting opinions in the Supreme Court of Georgia assume that the jurors in this case judged the film to be obscene in accordance with the standards of their community (Dougherty County). Mr. Justice Jordan, writing for the majority, held it appropriate for juries to "consider State *or* local community standards" *Jenkins* v. *State,* 230 Ga. 726, 199 S.E. 2d at p. 184 (emphasis ours). Mr. Justice Hawes, in his dissent, objected particularly to "the tacit approval of small towns and hamlets as*** the 'community' from which the standard for obscenity is drawn" 230 Ga. 726, 199 S.E. 2d at p. 189.

The Interest of the Amicus Curiae

Directors Guild of America, Inc. represents directors of motion picture films, television productions and radio programs throughout the United States and in most other countries where moving pictures are made. The Guild's principal aims are to protect the creative rights and economic interests of directors. Its principal offices are in Hollywood, New York and Chicago.

The Guild files this brief in support of the Appellant's position, for if the judgment of the Supreme Court of Georgia in this case is sustained, it will not be possible for directors to produce material relating to sex, for general distribution, unless the work satisfies the demands of the most repressive communities in the States.

The Courts below failed to distinguish between thoughtful comment on sexual attitudes in a film made with consummate skill, and the exploitation of mindless obscenity. The Guild supports the Appellant's request for a reversal of his conviction, for if the Judgment is reversed, the error of the Georgia courts may be less likely to recur.

POINT I

The Courts Below Violated the Constitutional Guarantee of Free Speech and Press in Punishing the Appellant for Showing the Film "Carnal Knowledge".

The suppression or punishment of a communication that is *not* obscene is, of course, a violation of the constitutional guarantee of freedom of speech or press, *Miller* v. *California*, 413 U.S. 15. In *Miller* the Court, to remove uncertainty in determining whether material is in fact obscene, "agreed on concrete guidelines to isolate 'hard-core' pornography from expression protected by the First Amendment" (413 U.S. at p. 29). One of the tests for identifying obscene material that the Court adopted in *Miller* is, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (413 U.S. at p. 24). See also *Jacobellis* v. *Ohio*, 378 U.S. 184 at p. 191. If a work does have serious literary, artistic, political or scientific value, the Court indicated that it merits First Amendment protection despite a "prurient, patently offensive depiction or description of sexual conduct" *Miller* v. *California*, 413 U.S. at p. 26.

The Court acknowledged in *Miller* that the application of its guidelines in specific cases "may not be an easy road, free from difficulty" (413 U.S. at p. 29). It suggested that if the constitutional standards are not properly applied in the first instance, appellate supervision will be adequate to protect First Amendment values (413 U.S. at p. 25). Quoting the opinion in

Roth v. *United States*, 354 U.S. 476, at p. 498, the Court said, "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case' " (*Miller* v. *California*, 413 U.S. at pp. 29, 30).

The problems of constitutional judgment in this case are not at all tough or difficult. As Mr. Justice Gunter wrote in his dissent in the Supreme Court of Georgia, "it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment * * * " *Jenkins* v. *State*, 230 Ga. 176, 199 S.E. 2d at p. 185. The film "Carnal Knowledge" is not, and it is not claimed that it is, "hard-core" pornography. The film does not portray "hard core sexual conduct for its own sake"[1] (*Miller* v. *California*, 413 U.S. at p. 35). There are a few brief scenes in the film that suggest sexual conduct but it is clear that they were not inserted to arouse prurient interest. The scenes are relevant and indeed essential to the central theme of the film.[2] The present members of the Court wrote in *Kois* v. *Wisconsin*, 408 U.S. 229 at p. 231, "A reviewing court must of necessity look at the context of the material * * * * "

The inquiry that Courts are called upon to make with respect to the serious artistic value of challenged material, does not, apparently, require any knowledge of the medium of expression, and the Courts are not expected to make informed critical judgments. The Court may pass upon the serious artistic value of the communication, without benefit of expert guidance or any evidence other than the questioned work. (*Paris Adult Theater I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S.

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[1] It seems clear from the opinion of the majority in *Miller* v. *California* that only hard-core pornography may be condemned as obscene.

[2] The film is about the unchanging, adolescent sexual attitudes of two young men who, as the critic of *Newsweek* wrote, "travel through time without changing, who live out destinies that are already drawn by the lines of their limited selves."

115.) In this case the State merely showed the film to the jury and then rested.

To pass judgment on the artistic quality of a film director's work, one should be able to perceive the manner in which, and the extent to which, the director realized the author's intention and style; one should also have knowledge or appreciation of acting techniques, and know the background of the actors with whom the director worked,[3] and be aware of the director's sense of timing and composition (the arrangement of figures, objects and space within the frame); and one should understand the director's uses of ambiguity, symbol, color,[4] lighting, voice, camera position,[5] camera movement, camera lenses and filters, music, scenery, costume, editing techniques, etc., etc. We hope it is not disrespectful to suggest that judges may be among the least qualified to apprehend the artistic quality of a film director's work. See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 380 (Mr. Justice Black, dissenting opinion).

The director, writer, actors, and cameramen involved in the production of "Carnal Knowledge" demonstrated great talent. It is manifest, even to one who does not have any

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[3] One cannot full appreciate the direction of the performance of Ann-Margret in "Carnal Knowledge" without knowing the limitations of the roles in which she had previously been cast.

[4] There are, for example, pronounced differences in the colors of Jonathan's two apartments. The whiteness of the second was intended to suggest a change in Jonathan's condition—not in him—and to evoke an earlier image.

[5] Judith Christ, critic of *New York Magazine*, wrote: "The film is physically brilliant, with Nichols using the camera to near X-ray-plate effect, concentrating (as he never has before) on the face, the gesture, the tiny scene—and achieving broad strokes of realism thereby. Unlike too many of today's films, *Carnal Knowledge* lasts beyond the watching; it sticks to the mind-ribs and bears long retrospection: a feast of a film."

knowledge of film-making, that the work of all involved in the production of "Carnal Knowledge" is, at the least, of a high quality. That is sufficient to bring the film within the protection of the First and Fourteenth Amendments. In *Kois* v. *Wisconsin*, 408 U.S. 229, the members of the present Court reviewed the conviction of the publisher of an unpolished poem describing sexual intercourse. The Court noted, in reversing the conviction, that although "the author's reach exceeded his grasp" the work at least bore "some of the earmarks of an attempt at serious art." (408 U.S. at pp. 231, 232.) In this case, the attempt to produce a work of serious art was successful. See also *Papish* v. *University of Missouri Curators*, 410 U.S. 667.

POINT II

The Statutes under which the Appellant was Convicted are Unconstitutional, for they Sanction the Application of "Local" Community Standards in Determining whether [redacted] Material is Obscene.

Another basic guideline set by the Court in *Miller* v. *California*, 413 U.S. 15, for the identification of obscenity, is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest" *Miller* v. *California*, 413 U.S. at p. 24. The Court concluded in *Miller* that the First Amendment does not require the application of *national* community standards (413 U.S. at p. 31). The Court did not address itself to the question of whether the community standards to be applied (in deciding whether material arouses prurient interest) must be the standards of a state or may be those of a city, village or neighborhood in which the triers of the facts reside.

As noted before, the Georgia Supreme Court ruled that juries may consider state *or* local community standards in deciding whether material is within the prohibition of the statutes that *Jenkins* allegedly violated. *Jenkins* v. *State*, 230 Ga. 726, 199 S.E. 2d at p. 184. The State Court's construction

of the statutes is conclusive. *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, at p. 688; *Speiser* v. *Randall,* 357 U.S. 513, at p. 519. The Justices of the Georgia Supreme Court assumed that the jurors in this case applied the standards of Dougherty County in judging the film obscene, for there had not been objection to the showing of "Carnal Knowledge" in any other part of the State.

A rule permitting judges and jurors to apply the singular standards of a town, county or rural area in deciding whether material is obscene would impose an intolerable burden on the distribution and dissemination of communication.[6] It is not feasible to prepare different versions of books, magazines and films for distribution in different parts of each of the states. As Mr. Justice Brennan wrote in *Jacobellis* v. *Ohio,* 378 U.S. 184:

> "We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in *Manual Enterprises, Inc.* v. *Day,* 370 U.S.[478], at 488, that a standard based on a particular local community would have 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler* v. *Michigan,* 352 U.S. 380' " (378 U.S. at p. 193).
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> * * *
>
> "Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person who would sell a book or

[6] The burden is increased by the possibility of prosecution in the district in which the material was found obscene, if the material is, thereafter, merely shipped through the district. *Reed Enterprises* v. *Clark,* 278 F.Supp. 372, aff'd 390 U.S. 457.

exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection. The result would thus be 'to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' *Smith* v. *California*, 361 U.S. 147, 154" (378 U.S. at p. 194).

Although it did not reach the conclusion suggested by its language, this Court wrote in *Miller* v. *California*, 413 U.S. at p. 30, "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community * * *." The Court decided in *Miller* that the question of obscenity may be judged by the mores of a State. We do not believe "a lesser geographical framework for judging this issue"[7] may constitutionally be permitted.

There is no logical or social justification for a rule that would countenance the suppression of a work in one city, after it was held entitled to constitutional protection in other cities of the same State. There is no great danger of moral degradation, and certainly no sacrifice of state sovereignty, if the standards of the state, rather than the several standards of lesser geographical areas, are accepted as the norm.

POINT III

The Statutes Allegedly Violated by the Appellant Infringe the Right of Communication Protected by the First and Fourteenth Amendments of the Constitution.

In the first and second points of this brief, it is argued that if the lower courts had followed the appropriate guidelines they could not have found "Carnal Knowledge" obscene. However, the *amicus curiae* is of the opinion that *all* communication to adults who wish to receive it, is protected against regulation by the First and Fourteenth Amendments. This case furnishes an

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[7] The phrase is Mr. Justice Harlan's in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 at p. 488.

occasion for a reconsideration of this Court's decisions that obscenity is not within the area of constitutionally protected speech or press.

Although the Court in *Miller* described its guidelines for isolating hard-core pornography, as "concrete" (413 U.S. at p. 29), people of common intelligence cannot reasonably anticipate their application in any except extreme cases. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Winters* v. *New York*, 333 U.S. 507, 518. There cannot be any safeguard against arbitrary application of the standards:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *;
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined * * *;
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Miller* v. *California*, 413 U.S. 15, at p. 24.)

Mr. Justice Brennan wrote, dissenting in *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, at p. 84: " * * * I am reluctantly forced to the conclusion that none of the available formulas, * * * can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' *Jacobellis* v. *Ohio*, [378 US 184] at 197 (STEWART, J., con-

curring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

It is not possible to formulate a test, or to draw a Plimsoll line, that will enable courts readily to distinguish communication that is constitutionally protected, from material that may be punished as obscene. This case furnishes an example of the likelihood that, unless the Court reconsiders its position, laws punishing the publication or distribution of communication said to be obscene, will be misapplied and freedom of speech and press will be curtailed.

In *Miller* v. *California,* 413 U.S. 15 at p. 25 this Court gave its assurance that it and other appellate courts would stand as guardians against derogation of the constitutional right of expression. But there are not many publishers or film producers willing and able to bear the staggering expense of appeal to this Court; and at least on occasion when the right of expression is denied, it may not be vindicated. We can ill afford the loss of any work of value.[8]

CONCLUSION

For the Reasons Outlined, the Judgment Appealed from Should Be Reversed.

Respectfully submitted,

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[8] As Mr. Justice Brennan pointed out in his dissent in *Paris Adult Theater I* v. *Slaton,* 413 U.S. at p. 85, fn. 9, the Constitution protects the right to receive communication as well as the right to publish it.